No. 11433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director Immigration and Naturalization Service, Department of Justice, District No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

Jurisdiction.

The United States District Court for the Southern District of California had jurisdiction of the writ of habeas corpus proceeding under Section 752, R. S., February 13, 1925, c. 229, Section 6, 43 Stat. 940 (28 U. S. C. 452). The appellee was being held in the custody of the appellant in the County of Los Angeles, State of California, within the jurisdiction of the District Court. This Court has jurisdiction of the appeal under Section 463(a) of Title 28 U. S. C.

Statutes and Regulations Involved.

Section 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 889 (8 U. S. C. 155(a)) provides, *inter alia* (Deportation of Undesirable Aliens):

> "* * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of a conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States * * *"

The Philippine Independence Act (Act approved Mar. 24, 1934, Public Law 127, 73d Congress), provides:

> "(1) For the purposes of Chapter 6 of Title 8 (except Sec. 213 c.) this section and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands, who are not citizens of the United States, shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of 50. * * * (48 U. S. C. Section 1238)."

Pursuant to authority conferred upon the then Secretary of Labor, a regulation designated General Order 209, dated June 8, 1934, was promulgated. (8 Code of Federal Regulations Part 172.)

Section 172.9 of the Regulation provides:

> "All citizens of the Philippine Islands shall be subject to deportation and may be deported in the same manner, as aliens, with the following exceptions:
>
> (a) A citizen of the Philippine Islands who has resided in the United States continuously since April 30, 1934, shall not be subject to deportation for any

act of his that occurred, or mental or physical disease, disability, or defect that existed prior to May 1, 1934; * * *."[1]

Statement of the Case.

Petition for writ of habeas corpus was filed in the United States District Court for the Southern District of California, Central Division, on June 11, 1946 [R. 2 to 5, 9]. On the same date order was entered awarding the writ of habeas corpus [R. 9, 10]. Return to the writ was filed on June 14, 1946 [R. 11 to 36]. Traverse was thereafter filed on June 17, 1946 [R. 37 to 40]. On June 17, 1946 and June 21, 1946, the matter was heard by the court [R. 41, 50 to 83].

The district judge granted the writ on June 21, 1946 but upon motion of the Government withheld discharging the appellee, pending signing and filing of the formal order [R. 42], and released appellee on court bond. On July 2, 1946 the court signed and ordered filed findings of fact and conclusions of law and ordered appellee discharged from the custody of appellant and exonerated the court bond [R. 42 to 47]. Formal notice of appeal was filed with the District Court on July 3, 1946 [R. 47]. On July 26, 1946 order extending time to file record and docket appeal to October 1, 1946 was approved and filed with the court [R. 48].

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[1]Effective July 4, 1946, Part 172 of Title 8, Code of Federal Regulations, was revoked in its entirety but contained the saving clause: "Provided, that revocation shall not affect any proceedings or parts of proceedings which take place prior to July 4, 1946," and a new Part 172 assigned, effective the same date, under the title "Immigration, exclusion and deportation of Filipinos under the provisions of the Philippine Rehabilitation Act of 1946 and the Philippine Trade Act of 1946." (See: 11 Federal Register 7127 of June 27, 1946.)

Summary of Facts.

The appellee is a native and citizen of the Philippine Islands, of the Filipino race [R. 28]. He arrived in the Territory of Hawaii on September 9, 1927, where he continued to reside until arrival upon the mainland of the United States on July 11, 1929 [R. 29]. Appellee never thereafter left continental United States except to make a trip to Tijuana, Mexico to be married on March 20, 1934, returning to the United States the same day [R. 28, 29,[2] 43].

On October 11, 1934, at San Luis Obispo, California, appellee killed one William A. B. Master [R. 30], and was on January 28, 1935, upon a plea of Not Guilty, convicted of the crime of Second Degree Murder and sentenced to serve five years to life in the California State Prison at San Quentin [R. 31, 33 to 35, 43].

On April 23, 1935 sworn statement was accepted from the appellee by an officer of the Immigration and Naturalization Service at San Quentin Prison [R. 27 to 35, 43, 71 to 75] and warrant of arrest issued on August 2, 1935 by the Secretary of Labor [R. 23, 25, 26, 44], and appellee was thereafter, on September 12, 1935, accorded a hearing under the warrant of arrest in deportation proceedings [R. 22 to 26, 44]. On November 8, 1935 warrant directing

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[2]The figures "1937" appearing in the answer in the last line, bottom of page 29 of the transcript of record, is an error in printing as the original exhibit attached to appellant's return shows the year to have been recorded as "1927" instead of "1937."

the deportation of the appellee to the Philippine Islands upon his release from imprisonment was issued [R. 20, 21, 44]. The appellee was not released from imprisonment until May 22, 1942 [R. 44].

Appellee had been surrendered into the custody of the appellant for deportation to the Philippine Islands on June 12, 1946 when the writ of habeas corpus proceedings were instituted [R. 9, 11, 12].

Questions at Issue.

1. Did the District Court err in holding that the re-entry of appellee into the United States from Mexico on March 20, 1934 was "an act of his" precluding deportation within the meaning of the regulation set forth in Section 172.9(a), Title 8 Code of Federal Regulations, *supra?*

2. Is the said regulation as interpreted and construed by the District Court void in that so construed it makes an additional exception or limitation not authorized by the Act of Congress contained in Section 8 of the Philippine Independence Act, declaring the Immigration Acts of 1917 and 1924 applicable to Filipinos, and as being inconsistent with the language of Section 19(a) of the Immigration Act of February 5, 1917, here involved?

ARGUMENT.

While it may have no material bearing on the questions at issue in this appeal, we do not find that citizens of the Philippine Islands have ever been declared by Congress to be citizens of the United States. It is necessary that a person occupying such status naturalize to become a citizen of the United States.[3]

Following the ratification of the Treaty of Paris on April 11, 1899 ceding the Philippine Islands to the United States, they owed no allegiance to any foreign government. They owed allegiance to the United States. It was therefore said that they were not aliens.[4]

For certain purposes citizens of the Philippine Islands have, however, been declared to be aliens.[5]

On and after May 1, 1934 citizens of the Philippine Islands were declared by Act of Congress to be aliens for the purposes of the Immigration Acts of 1917 and 1924.[6]

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[3]*In re Bautista,* 245 F. (2d) 765, 771.

[4]*Toyota v. United States,* 45 S. Ct. 563, 565, 268 U. S. 402, 411, 69 L. Ed. 1016.

[5]*Ganey v. United States,* 8 Cir., 149 F. (2d) 788.

[6]Section 8, Philippine Independence Act, *supra.*

I.

"Entry" Not a Part of Deportable Ground.

The District Court concludes that the applicable deportation statute[7] requires a concurrence of the conviction for the specified crime and entry of the alien *as an alien,* and reasons that since appellee at the time of entry into the United States from Mexico, on March 20, 1934, had not yet been declared an alien for immigration purposes, one element required by the deportation statute was lacking [R. 79, 80].

Appellant contends that deportation is directed by Congress not because of the "entry", but rather by reason of conviction of and sentence for the indicated crime. "Entry" merely fixes the date from which the five-year limitation period runs. An analogous situation is present in the case of an alien who is lawfully admitted for permanent residence. He may remain in the United States indefinitely if he is not convicted of crime. If he is convicted of such crime, "it is immaterial whether he was entitled to admission or whether he lawfully entered" the United States.[8] "It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, * * * in-

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[7]8 U. S. C. A. 155(a) "* * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, * * *."

[8]*Claussen v. Day,* 49 S. Ct. 354, 279 U. S. 398, 400, 73 L. Ed. 758.

cludes authority to *impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend*"[9] (emphasis added). If the "act of his" for which appellee is *subject to deportation* is the "conviction of crime" and not "entry", then he clearly is not being subjected to deportation for his act of entering the United States on *March 20, 1934,* within the meaning of the regulation in question.[10] True, his entry into the United States on March 20, 1934 was an "act of his", but it is not an "act of his" which is a ground for deportation under either the 1924 or 1917 Immigration Acts. The act of the appellee which subjected him to deportation was his commission of crime followed by conviction and sentence therefor. The regulation exempts from deportation only where the "act of his" is the basis for the deportation and it occurs prior to May 1, 1934. The offense of second degree murder was committed on October 11, 1934. Appellee had been sentenced on January 28, 1935. These latter events occurred at a time when by Section 8 of the Philippine Independence Act, appellee was declared by Congress to be an alien for the purposes of the Immigration Acts of 1917 and 1924. The date of his commission of the crime, on October 11, 1934, with its resulting conviction and sentence, was when the "act of his" occurred which constituted the basis for deportation, and not his act of entering the United States on March 20, 1934. His "act" of reentry is no part of the ground for deportation.

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[9]*Zakenaite v. Wolf*, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

[10]Section 172.9, Title 8, Code of Federal Regulations, *supra*.

An example of an "act of his" occurring prior to May 1, 1934 and which would come within a deportable ground within the meaning of the regulation exempting from deportation might be stated in the case of a Filipino who subsequent to the effective date of the 1917 Immigration Act and prior to May 1, 1934 had been convicted and sentenced to a year or more on more than one occasion "* * * because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." This would be a deportable ground under the 1917 Act, but because it occurred prior to May 1, 1934 the regulation directs that deportation not be undertaken.

The Government contends further that the language of the applicable portion of Section 19(a) of the Immigration Act of February 5, 1917 (8 U. S. C. 155(a)), does not require the construction given by the court below to the effect that the five-year statutory period of limitation runs only from the reentry into the United States of the appellee *as an alien*. The statute refers first to "any alien who is hereafter sentenced." Appellee was for immigration purposes an alien when he was sentenced on January 28, 1935 [R. 35]. The statute then refers to the crime "* * * committed within five years after entry of the alien to the United States." The words "the alien" relate back to "any alien * * * sentenced", recited in the first portion of the provision. It should not, therefore, be construed as if it were meant to read "committed within five years after entry of the alien *as an alien*", which would appear to be the effect of the construction arrived at by the District Court. The literal construction of the applicable language of the 1917 Act here contended for is consistent

with prior decisions of the courts arising under that Act, and also with the purposes and intent of the Philippine Independence Act. The latter act provides in part that,

> "* * * for the purposes of the Immigration Act of 1917 * * * citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens."[11]

Congress therefore required that the Immigration Act of 1917 be applied with the same force and effect to the persons indicated in the quoted language as applied to aliens generally. In this connection it is significant to observe that the Second Circuit Court of Appeals in construing that portion of Section 19(a) of the 1917 Act, *supra,* here involved, stated:

> "We think that the intention of Congress was plain to make an alien of the class to which the appellant belongs, subject to apprehension and deportation whenever found, even though his entry into the country was prior to the effective date of the Alien Immigration Act of 1917."[12]

Again, the Second Circuit Court of Appeals in construing other deportation provisions of the 1917 Act, *supra,* applicable to an alien who was a professional beggar and who entered the United States in 1913 and an alien who entered in 1914 and subsequently became a public charge by reason of insanity, held that the provisions of the 1917

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[11]Section 8, Philippine Independence Act.

[12]*Lauria v. United States*, 271 Fed. 261; cert. den. 42 S. Ct. 48, 257 U. S. 635, 66 L. Ed. 408.

Act are retroactive, adopting an earlier decision of this Honorable Court to the same effect.[13]

While it is true that the cases last above referred to involved persons who were aliens at the time of entry, the mere fact that such person entered prior to the effective date of the 1917 Act was not held to bar deportation for causes subsequently arising. The fact that appellee was a national at the time of his last entry on March 20, 1934 should not make inapplicable the principle of these cases to the issues herein raised.

II.

The Regulation Is Void if It Must Be Construed as Interpreted by the District Court in That Under Such Construction It Constitutes a Limitation on the Application of the Immigration Acts, Not Authorized by Section 8 of the Philippine Independence Act, Supra.

But for the one express exception, Congress has declared that the 1917 and 1924 Immigration Acts shall be applicable to the Philippine citizens therein specified in the same manner as those laws are applied to aliens generally. The pertinent language of Section 8 of the Philippine Independence Act, reads:

> "For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except Section 13(c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens."

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[13] *U. S. ex rel. David v. Todd, etc.*, 2d Cir., 289 Fed. 60, referring to *Akira Ono v. U. S.*, 9th Cir., 267 Fed. 359.

If it be conceded, as here contended, that the fact constituting the ground for appellee's deportation is the commission of the offense and subsequent conviction and sentence for the crime of second degree murder after May 1, 1934, then the 1917 Immigration Act is applicable to the appellee without any exception or limitation. It would therefore follow that the regulation as interpreted by the lower court places a limitation on the application of the 1917 Immigration Act not authorized by the Philippine Independence Act which expressly declares that the 1917 and 1924 Immigration Acts are to have the same application to the newly designated class of aliens as to all other aliens, with the one exception of Section 13(c) of the 1924 Act. (8 U. S. C. 213(c).)

Moreover, if the deportable ground includes as one of its elements "entry as an alien", as was in effect concluded by the District Court, such construction of the regulation renders partially inapplicable the involved deportation clause of Section 19(a) of the 1917 Act, thereby nullifying completely that portion of the deportation clause relating to the commission, conviction and sentence for crime.

Since Congress expressly states that the 1917 and 1924 Immigration Acts are to be applied to Philippine citizens in the same manner as to other aliens, but for the exception of Section 13(c) of the 1924 Act, it is only logical to conclude that Congress meant that no other exception should be made in applying these laws to Philippine citizens. This conclusion has support in the long established

rule of statutory construction that where a statute declares that all its provisions are applicable and enumerates a particular exception, the expression of the exception implies an intent to exclude all other exceptions.[14]

Conclusion.

The involved regulation obviously does not preclude deportation for any "act of his" (appellee's) that occurred prior to May 1, 1934, but only where the "act of his" occuring prior to that date would, but for the date of its occurrence, constitute a basis for deportation within the purview of the provisions of the deportation laws contained in the Immigration Acts of 1917 and 1924. We contend that the act of appellee which constituted an act cognizable under the deportation law as a ground for expulsion was not his entry into the United States from Mexico on March 20, 1934, but rather his act of committing the offense of second degree murder for which he was convicted and sentenced to imprisonment for the term of more than one year, all of which latter events occurred after May 1, 1934; that the time of entry merely indicates the date from which the running of the statutory period of limitation is measured. Further, that the charge upon which appellee's deportation is directed under Section 19(a) of the 1917 Immigration Act, *supra,* is not required to be construed as if it read "committed within five years after

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[14]*Continental Casualty Company v. U. S.*, 62 S. Ct. 393, 396, 314 U. S. 527, 533, 86 L. Ed. 426. See also *Knapp-Monarch Company v. Commissioner of Internal Revenue,* 139 F. (2d) 863, 864.

the entry of the alien to the United States *as an alien.*" Congress has at no time conferred United States citizenship upon citizens of the Philippine Islands, and appellee has never acquired the legal status of a United States citizen.

The lower court's interpretation of the regulation renders it void, in that it would constitute a limitation on the application of the Immigration Acts of 1917 and 1924 not authorized by Congress under Section 8 of the Philippine Independence Act. From the wording of the latter act it is clear that the only limitation contemplated by Congress was with respect to Section 13(c) of the 1924 Immigration Act. The interpretation of the District Court, the commission of the offense, conviction.

Respectfully submitted,

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